



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 12, 1998

Mr. Paul Gonzalez
Matthews and Branscomb
106 South St. Mary's Street, Suite 700
San Antonio, Texas 78205

OR98-1447

Dear Mr. Gonzalez:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 115952.

The City Public Service Board of the City of San Antonio (the "city"), which you represent, received a request for a copy of two coal transportation agreements. The first agreement is between the city and Burlington Northern and Santa Fe Railway Company ("BNSF"). The second agreement is between the city and Union Pacific Railroad Company ("Union Pacific"). You indicate that the requested contracts "may implicate private or property interests of the contracting parties." Pursuant to section 552.305 of the Government Code, this office notified BNSF and Union Pacific of the public information request and provided an opportunity to submit reasons as to why the contracts should be withheld from disclosure. This office received responses from both BNSF and Union Pacific.

We note initially that BNSF asserts that its contract with the city contains a confidentiality provision that "prohibits the parties from revealing the terms of the contract to others except under the limited circumstances listed in the provision," and also asserts that "[n]one of the exceptions apply here." The referenced confidentiality provision states that the parties to the contract must keep the terms and conditions confidential, but also provides for disclosure "as required by law." Chapter 552 of the Government Code, the Open Records Act (the "Act"), is applicable law which provides that information held by governmental

bodies must be publicly disclosed unless otherwise protected from disclosure by one of the Act's exceptions.¹

Union Pacific contends that the portions of its contract that deal with base rates, rate adjustment provisions, minimum volume requirements, and service features are trade secrets protected from disclosure under section 552.110 of the Government Code. Section 552.110 provides an exception for "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." The company explains that its contract which was at issue in Open Records Decision No. 541 (1990) is essentially the same contract as the one at issue in this request. Thus, Union Pacific seeks to withhold the corresponding portions of this contract which were previously determined to be trade secrets in Open Records Decision No. 541 (1990).

In Open Records Decision No. 541 (1990), this office considered section 552.110 arguments concerning a coal transportation agreement between Union Pacific and other contracting parties. We noted that this office has not generally found that contracts are confidential trade secrets in their entirety. *Id.* at 7-8 (referring to Open Records Decision No. 514 (1988) at 5, which stated "the general terms of a contract may not properly be withheld under the Open Records Act."). However, in that decision we agreed that the portion of the contract "prescribing base rates and adjustments to rates, minimum volume requirements, and service features" were trade secrets protected from disclosure under section 552.110. Open Records Decision No. 541 (1990) at 14. Since you indicate that the Union Pacific contract at issue in Open Records Decision No. 541 (1990) is virtually identical to the Union Pacific contract at issue in this request, we conclude that the provisions held to be confidential in that opinion must also be withheld in this contract. You identify the portions of the contract that deal with rates, minimum volume requirements and service features to be sections 6, 7, 8, 9, 10, 11, 16, and Exhibits A, B, and C. We agree that these portions of the submitted Union Pacific contract must be withheld from disclosure.

BNSF also asserts that the contract terms that relate to rates, minimum volume requirements, and specific service features are excepted from disclosure as trade secrets under section 552.110 of the Government Code. Generally, if a company claims that information is a trade secret, and a governmental body takes no position concerning the applicability of section 552.110, then this office will accept the company's claim if the company establishes a *prima facie* case and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of

¹We note that unless a governmental body has specific statutory authority to do so, it may not agree to keep information confidential when the information is subject to disclosure under the Act. Open Records Decision No. 514 (1988).

Torts.² *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).³

BNSF submitted an affidavit from the company's Manager of Coal Marketing, which provided specific information showing how the company maintains the contract as confidential through disclosure and copy limits, by enforcing the confidentiality agreement in the contract, and by use of other security measures. BNSF discusses the competitive interest that the company has in coal transportation. The company explains that it is currently in competition with other companies for similar coal transportation contracts and that disclosure of the contract terms would put BNSF at a competitive disadvantage in negotiating these contracts. We agree that BNSF has shown that portions of its contract are protected. We have marked the portions that must be withheld from disclosure under section 552.110.

² Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added).

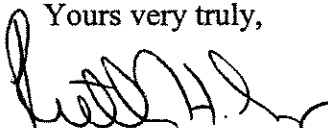
³The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Ruth H. Soucy', with a stylized flourish at the end.

Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref: ID# 115952

Enclosures: Submitted documents

cc: Ms. Linda Lawrence
Enron Power Marketing, Inc.
1400 Smith Street, EB839C
Houston, Texas 77002
(w/o enclosures)